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LER CHENG CHYE LIQUIDATOR OF CASTWELL SDN. BHD.

v.

DIRECTOR OF CUSTOMS, FEDERAL TERRITORY

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

b

[ORIGINATING SUMMONS NO. D2-31-322-87]

2 MARCH 1992

STATUTORY INTERPRETATION: *Whether upon the true construction of s. 69(1) of the Sales Tax Act 1972 and s. 292 of the Companies Act 1965 there is a conflict - Whether maxim lex posterior derogat priori applies.*

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REVENUE LAW: *Whether the sales tax in a liquidation enjoys priority over a debenture holder - Or administrative only - Whether priority can be claimed under s. 10 of the Government Proceedings Act - And s. 292(1) of the Companies Act 1965 provides that payment of all federal tax comes last in the order of priority.*

d

On 15 December 1981 and 20 April 1984 Castwell Sdn. Bhd. (Castwell) created two debentures in favour of Malaysian Industrial Development Finance Bhd. and The Chartered Bank as security for loan facilities granted to the plaintiff.

On 14 July 1986 at an extraordinary general meeting of Castwell's shareholders a resolution was passed that Castwell be wound - up voluntarily and that the plaintiff be appointed as liquidator (the liquidator). In the course of the liquidatorship it was found that Castwell had not paid sales tax to the Customs and Excise Department in February 1985.

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By a letter dated 13 May 1987 the liquidator sought confirmation from the department that any sales tax due from Castwell should rank after the floating charge but before the unsecured creditors by virtue of s. 292(4) of the Companies Act 1965. By a letter dated 20 June 1987, the defendant replied that the sales tax due should be paid first before any floating charge and unsecured creditors by virtue of s. 69(1) of the Sales Tax Act 1972.

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The issue before the Court is whether there is a conflict between s. 292 of the Companies Act and s. 69 of Sales Tax Act and if there is such a conflict, then whether the *maxim lex posterior derogat priori* applies.

Held:

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[1] The learned Judge took the view that there is no conflict between s. 69(1) of the Sales Tax Act and s. 292 of the Companies Act.

[2] Section 69 merely requires the liquidator to set aside such sum of money out of the assets. It does not say that the liquidator must pay the Director - General before disposing any of the assets, s. 292 however, speaks in terms of priority of payment. Therefore the *maxim lex posterior derogat priori*, relied upon by the Senior Federal Counsel does not apply to the present case.

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[3] This Court agrees with the decision in *Annuarul's* case that the setting aside of money sufficient to provide for taxation is only an administrative function but does not confer priority rights over other things.

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[4] In the circumstances, the learned Judge ruled that s. 69 of the Sales Tax Act does not have priority of payment over preferential payments of the claims of holders of debenture under the floating charge.

[Costs to the plaintiff.]

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Cases referred to:

Re Golden Palace Musical Hall Sdn. Bhd. [1988] 2 MLJ 634 (dist)

Annuarul Aini bin Mohd Perai & Anor. v. Ketua Pengarah Kastam & Eksias Di Raja Malaysia [1991] 2 CLJ (Rep) 278 (foll)

Federal Commissioners of Taxation v. Official Liquidator of EO Farley Ltd. [1940] 63 CLR 278 (foll)

b

Legislation referred to:

Companies Act 1965, ss. 192, 275, 292(1), (1)(f), (2), (4)

Government Proceedings Act 1956 (Act 359), s. 10

Sales Tax Act 1972, s. 69(1)

Service Tax Act 1975, s. 52

For the plaintiff - De Silva; M/s. Chooi & Co.

For the defendant - Abdul Hamid Embong, SFC

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JUDGMENT

Zakaria Yatim J:

This is an application by the Liquidator of Castwell Sdn. Bhd. for directions in respect of the following:

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- (1) Whether, on the true construction of s. 69(1) of the Sales Tax Act 1972, the Sales Tax Act has priority of payment over preferential payments and the claims of the holders of debentures under a floating charge created by the company in view of the provisions contained in s. 275 and subsections (1)(f) and (4) of s. 292 of the Companies Act 1965.
- (2) In the event that the Court should rule in favour of priority of sales tax the plaintiff seeks an order that the costs, charges and expenses of and identical to the winding-up be paid in priority to the sales tax.

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On 15 December 1981 and 20 April 1984 Castwell Sdn. Bhd. (Castwell) created two debentures in favour of Malaysian Industrial Dypt. Finance Bhd. and The Chartered Bank as security for loan facilities granted to the plaintiff. On 14 July 1986 at an extraordinary general meeting of Castwell's shareholders, a resolution was passed that Castwell be wound - up voluntarily and Mr. Ler Cheng Chye was appointed liquidator (the liquidator). In the course of his liquidatorship he found that Castwell had not paid sales tax to the Customs & Excise Department in February 1985.

f

By a letter dated 13 May 1987, the liquidator sought confirmation from the Department that any sales tax due from Castwell should rank after the floating charge but before the unsecured creditors by virtue of s. 292(4) of the Companies Act 1965. By a letter dated 20 June 1987, the defendant replied that the sales tax due should be paid first before any floating charge and unsecured creditors by virtue of s. 69(1) of the Sales Tax Act 1972.

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Section 69(1) of the Sales Tax Act provides:

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Where after the passing of this Act an effective resolution is passed or an order is made for the winding - up of a company which is a licensed manufacturer the liquidator of the company shall give notice thereof to the Director-General within fourteen days thereafter, and shall before disposing of any of the assets of the company **set aside such sum out of the assets** as appears to the Director General to be sufficient to provide for any sales tax that is or will thereafter become payable in respect of the company.

(Emphasis added)

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a Section 275 of the Companies Act provides that all proper costs charges and expenses of and incidental to the winding - up including the remuneration of the liquidator shall be payable out of the assets of the company in priority to all other claims.

Section 292(1) lists out six types of payment which must be made in priority to all other unsecured debts namely:

- b** (a) the costs and expenses of the winding - up including the remuneration of the liquidator;
- (b) all wages or salary including the amount payable by way of allowance or reimbursement under any contract of employment;
- (c) all amounts due in respect of worker's compensation under any written law;
- c** (d) all remuneration payable to any employee in respect of vacation leave or in the case of his death to any other person in his right;
- (e) all amounts due in respect of contributions during the twelve months next before the commencement of the winding - up, such amounts being employees superannuation or provident funds or under any schemes of superannuation or retirement benefit; and
- d** (f) the amount of all federal tax assessed under any written law before the date of the commencement of the winding-up. Subsection 2 of s. 292 expressly states that the debts in each class specified in subsection (1) shall rank in the order therein specified but debts of the same class shall rank equally between themselves.

Upon reading s. 292(1) it is clear that payment of all federal tax comes last in the order of priority.

e Another Act which was referred to during the hearing is the Government Proceedings Act 1956 (Act 359). Section 10 of the Act states as follows:

- f** 10(1) All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever.
- (2) Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge or immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

g Encik Hamid Embong, Senior Federal Counsel, who appeared for the defendant submitted that there is a conflict between s. 292 of the Companies Act and s. 69 of Sales Tax Act. According to him where there is conflict between the provisions of the respective acts, the maxim *les posterior derogat priori* applies.

h In support of his argument, he relied on the decision of the High Court in *Re Golden Palace Musical Hall Sdn. Bhd.* [1988] 2 MLJ 634. In that case, the applicant was appointed a receiver of a company pursuant to powers contained in a debenture issued to a bank. The receiver recovered from an insurance company a sum of RM295,000. The Customs & Excise Department claimed a sum of RM103,520 being arrears of service tax in priority to all other claims. The Court held that the claim of the said department was to be paid first before the claim for the principal and interest of the debenture holder, the bank. The learned Judge found that there was an inconciliabale conflict between s. 52 of the Service Tax Act 1975 and ss. 292 and 192 of the Companies Act and applied the maxim *lex posterior derogat priori*.

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Mrs. De Silva, Counsel for the liquidator submitted that there was no conflict between s. 69 of the Sales Tax Act and s. 292 of the Companies Act. She said that sales tax in a liquidation does not enjoy priority over a debenture holder because: **a**

- (a) the Sales Tax Act does not create a priority and is administrative only;
- (b) no priority can be claimed under s. 10 of the Government Proceedings Act because that section had been impliedly repealed by s. 292 of the Companies Act as s. 213 expressly binds the Government. **b**

In support of her contention she relied on another High Court case, *Annuarul Aini bin Mohd Perai & Anor. v. Ketua Pengarah Kastam & Eksais Di Raja Malaysia* [1991] 2 CLJ (Rep) 278. The facts of that case, as stated in the headnote are that one S, a licensed manufacturer under the Sales Tax Act issued a debenture in the form of a fixed charge over certain assets in favour of MIDF. The plaintiffs were appointed receivers by MIDF and sold S's fixed assets for RM1.2 million. The defendants claimed a sum of RM5,226.52 from the plaintiff which they alleged to be due by S to the defendants under s. 70 of the Act. The Court, adopted the views of Strake J in *Federal Commissioners of Taxation v. Official Liquidator of EO Farley Ltd.* [1940] 63 CLR 278, where Strake J said that the setting aside of money sufficient to provide for taxation is only an administrative function and did not confer priority rights over other things. The Court in *Annuarul's* case accordingly held that sales tax levied in that case did not become a priority in payment over and above a debenture holder over a fixed charge. **c**

Mrs. De Silva informed me that there was an appeal against the decision of the learned Judge in *Annuarul's* case and the Supreme Court confirmed the decision. **d**

In my view there is no conflict between s. 69(1) of the Sales Tax Act and s. 292 of the Companies Act. **e**

Section 69 merely requires the liquidator to set aside such sum of money out of the assets. It does not say that the liquidator must pay the Director-General before disposing any of the assets. Section 292 however, speaks in terms of priority of payment. Therefore the maxim *lex posterior derogat priori*, relied upon by the Senior Federal Counsel does not apply to the present case. **f**

I agree with the decision in *Annuarul's* case that the setting aside of money sufficient to provide for taxation is only an administrative function but does not confer priority rights over other things.

In the circumstances I rule that in respect of prayer 1, s. 69 of the Sales Tax Act does not have priority over preferential payments of the claims of holders of debenture under the floating charge. In the light of this ruling, prayer 2 of the application is not relevant anymore. Costs to the plaintiff. **g**

Also found at [1992] 2 CLJ 1019

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